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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

JEFFREY R. GOLIN et al. Plaintiffs and Appellants, v. CITY OF PALO ALTO et al., Defendants and Respondents.	A144680 (San Mateo County Super. Ct. No. CIV 507159)

In November 2001, Jeffrey and Elsie Golin's developmentally disabled daughter, Nancy Golin,[1] wandered away from home and went missing for over 15 hours. Police Detective Lori Kratzer assisted in the search for Nancy. After Nancy returned home, Kratzer initiated a 72-hour hold of Nancy pursuant to Welfare and Institutions Code[2] section 5150. Kratzer also obtained an emergency protective order barring Jeffrey and Elsie from contacting Nancy, and referred Jeffrey and Elsie to the district attorney for prosecution for dependent adult abuse. Jeffrey, Elsie, and Nancy, through her guardian ad litem (collectively plaintiffs), subsequently brought this suit against the City of Palo Alto (the City) and Kratzer, along with over a dozen other defendants, asserting various violations of their constitutional rights under section 1983 of title 42 of the United States Code (hereafter section 1983), among other claims.

[1] Because Jeffrey, Elsie, and Nancy share the same surname, we refer to them by their first names. We mean no disrespect in doing so.

[2] All statutory references are to the Welfare and Institutions Code, unless otherwise specified.

The trial court sustained the City's demurrer to the section 1983 claims without leave to amend, and later granted Kratzer and the City's motion for summary judgment on all remaining claims. Plaintiffs now appeal, arguing there are triable issues of fact as to their section 1983 claims against Kratzer, and the trial court should have granted them leave to amend their section 1983 claims against the City. We disagree and affirm.

I. BACKGROUND

A. *Factual Background*

Nancy is an autistic adult, developmentally disabled since birth. On November 15, 2001, the Palo Alto Police Department received a 911 call from Nancy's parents, Elsie and Jeffrey, reporting Nancy had gone missing. Nancy had a lengthy history of wandering away from home without supervision. According to Elsie, Nancy was living with her in a recreational vehicle (RV) at the time. Elsie also owned two vans, but she denies she or Nancy lived in them. Jeffrey was living in a commercial space located on San Antonio Road in Palo Alto. Plaintiffs allege[3] Jeffrey operated a neon workshop in this space.

Detective Kratzer assisted with the search for Nancy. Kratzer contacted adult protective services (APS) and the San Andreas Regional Center (SARC) to determine if either agency had any record of Nancy. Kratzer learned both SARC and APS had been attempting to offer Nancy services but her parents were resistant to agency intervention. SARC also reported Nancy and her parents had no stable residence and their last known address was a U-Haul storage space in Mountain View. APS stated it had received six reports concerning Nancy since May 1999. A January 2001 report indicated Nancy had been hospitalized because of her parents' failure to comply with doctor's orders regarding medication. A May 2001 report stated Nancy had been placed on a section 5150 hold after three domestic violence calls from the Golins' home. A June 2001 report stated

[3] In their appellate briefing, plaintiffs primarily cite not to evidence submitted in connection with the summary judgment motion, but to the allegations of their pleading. When relevant, we recount those allegations here.

Nancy was placed on another section 5150 hold when she was found wandering around a restaurant late at night, mute and not responding to verbal commands.

Kratzer also interviewed Jeffrey and Elsie on November 15. Kratzer's report indicates both Jeffrey and Elsie were evasive and resistant to answering questions and were "very difficult to reason with." According to Kratzer's report, Jeffrey said the family was presently living out of their van because they were having difficulty finding housing in the area. Kratzer also reported Jeffrey and Elsie reluctantly allowed her to look inside the van where they were sleeping. Plaintiffs allege Kratzer actually inspected Elsie's RV. Kratzer reported the van smelled like "body odor and urine." When asked about the odor, Jeffrey and Elsie reportedly replied Nancy spent a lot of time in the van watching videos and she sometimes wet herself. According to Kratzer's report, Elsie appeared "irrational and mentally unstable." Elsie refused to tell Kratzer what medications Nancy was taking and tried to evade Kratzer's other questions.

Plaintiffs allege the police demanded entry to Jeffry's workshop to search for Nancy, and this was a "ruse" since the shop was locked and Nancy could not have entered it on her own. Jeffrey allegedly consented to entry, but only for the limited purpose of searching for Nancy. Plaintiffs also allege the police exceeded the scope of Jeffrey's consent by searching for building code violations. It is undisputed the police contacted the Palo Alto building inspector about the workshop. The inspector later determined there were numerous violations, including the fact the Golins were residing in a commercial building.

While Kratzer was talking with Jeffrey and Elsie, Nancy returned. She had been missing for at least 15 hours. According to Kratzer, Nancy's clothes were dirty, it looked as if she had not bathed for quite some time, her hair was oily, and she had body odor. Kratzer also noticed a wound covering the entire top of Nancy foot, which looked as if it was partially infected and scabbed over. Elsie told Kratzer the wound was the result of an "I.V." placed in her foot by a hospital. Kratzer also noticed other scars on Nancy's legs.

Kratzer decided to place Nancy on a section 5150 hold, as she believed Nancy posed a danger to herself and was concerned Nancy's parents were placing her health and well-being in danger. In her application to place Nancy on a section 5150 hold, Kratzer wrote: "31 yr old Nancy is autistic and suffers from grand mal seizures. Nancy has been living with biological parents who are homeless. Nancy has been kept in a van and on 11/14/01 at 2045 hrs. walked away and was not located until [November 15, 2011] at noon. Nancy is a danger to herself and is not conserved. Her parents are caretakers who have repeatedly refused services to assist them in caring for Nancy. Nancy has wandered off on numerous occasions, possibly 50 times. Parents may have mental health problems and are placing their daughter in danger. APS and San Andreas Regional Center have open cases on Nancy. Public guardian referral should be made for conservatorship." Kratzer later testified she believed Nancy was in danger because Nancy was nonverbal, she could not tell the police what happened, she had been gone for 15 hours, and she had a wound on her foot. Kratzer also based her decision on the information she received from APS and SARC.

According to the police report, Kratzer told the parents she was placing Nancy on section 5150 hold. But Elsie testified Kratzer told her Nancy was being taken to Stanford Hospital & Clinics (Stanford Hospital) for a wellness check. While Kratzer was drafting the hold, Elsie was permitted to take Nancy inside the workshop to change her clothing. Kratzer reported that, once inside, Elsie locked the police out until Kratzer convinced Elsie to let her in. In their pleading, plaintiffs allege Elsie allowed Jeffrey to enter and the police "barged in" behind him and began searching the workshop without consent or a warrant. Kratzer reported she found Nancy laying on a sleeping bag on the floor in a walled-off area. Kratzer noted there was a small portable toilet seat with a large plastic bag attached to the bottom, and there appeared to be urine in the bag. In her report, Kratzer wrote that Elsie told her the family slept in the workshop. Plaintiffs allege Elsie made no such statement.

Nancy was transported to Stanford Hospital. Examination reports indicated Nancy was autistic, had a seizure disorder, had an excessive amount of phenobarbital in her

system, had a five-by-seven-centimeter skin lesion on her left foot, had multiple well-healed skin grafts on her lower extremities, and was very dirty and unkempt. The reports also indicated Nancy would be discharged to a county residential facility.

On November 15 and 16, 2001, Kratzer made further inquiries into Nancy's situation. Kratzer received records from the Mountain View Police Department containing 11 pages of calls for service regarding Nancy, and the records included many missing person reports. The total number of calls for service exceeded 50. On November 16, 2001, Kratzer obtained emergency protective restraining orders for Nancy against Jeffrey and Elsie. On the same day, Kratzer referred Jeffrey and Elsie to the district attorney for prosecution. On November 27, 2011, the district attorney charged Jeffrey and Elsie with dependent adult abuse. (Pen. Code, § 368, subd. (b)(1).) Jeffrey pleaded no contest to a violation of misdemeanor dependent adult abuse. (Pen. Code, § 368, subd. (c).) His conviction was later expunged after he successfully completed six months' probation. The charge against Elsie was eventually dismissed.

In April 2002, the California Department of Developmental Services (DDS) initiated conservatorship proceedings for Nancy in Santa Clara County Superior Court. A three-week trial was held in September and October 2003. In a statement of decision, filed October 22, 2003, the court found by clear and convincing evidence Jeffrey and Elsie were unable to provide for the best interests of their daughter. The court appointed DDS as Nancy's permanent limited conservator. Jeffrey and Elsie were granted reasonable visitation with their daughter, so long as they abided by all visitation rules.

B. ***Procedural History***

In October 2003, plaintiffs filed a lawsuit in federal court against over a dozen defendants, including Kratzer and the City. They asserted 12 separate causes of action, including malicious prosecution under section 1983, fraud, slander, wrongful imprisonment, negligent and intentional infliction of emotional distress, and denial of Nancy's constitutional right to liberty and freedom of association. The district court dismissed the action, holding Jeffrey and Elsie lacked standing to assert claims on behalf of Nancy, and federal abstention doctrines barred consideration of claims arising out of

the conservatorship proceedings. The court also found the malicious prosecution claims failed because Jeffrey and Elsie could not show a lack of probable cause or that the criminal case was resolved on the merits in their favor. Finally, the court declined to exercise supplemental jurisdiction over Jeffrey and Elsie's state law claims.[4]

In April 2006, plaintiffs filed the instant action in Sacramento County Superior Court. Twenty-four parties were named as defendants, including Kratzer and the City. Defendants moved to transfer venue to Santa Clara County, and the motion was granted in October 2006. After the case was transferred, plaintiffs challenged the appointment of every judicial officer assigned to their case, and after one of the defendants was appointed as a judge to the Santa Clara County Superior Court, the entire bench of Santa Clara County recused.

Later, the City moved to have Jeffrey and Elsie declared vexatious litigants. The trial court granted the motion and required plaintiffs to post a $500,000 security to continue the litigation. Jeffrey and Elsie failed to post the bond, and the action was dismissed in its entirety. On appeal, our colleagues in the Sixth Appellate District found the trial court did not abuse its discretion in finding Jeffrey and Elsie vexatious litigants because of the their "persistent and obsessive use of judicial challenges in this action." (*Golin v. Allenby* (2010) 190 Cal.App.4th 616, 639.) However, the court also held security should not have been required because the defendants had failed to demonstrate there was no reasonable probability the plaintiffs would prevail in the action. (*Id.* at pp. 640–641.)

On remand, the case was transferred to the San Mateo County Superior Court. Plaintiffs filed their third amended complaint on February 1, 2013. They subsequently voluntarily dismissed some of their claims against Kratzer and the City. Kratzer and the City demurred to the third amended complaint. The trial court sustained the City's

[4] The Ninth Circuit affirmed (*Golin v. Allenby* (9th Cir. 2005) 135 Fed.Appx. 978), and the United States Supreme Court denied plaintiffs' petition for writ of certiorari (*Golin v. Allenby* (2006) 547 U.S. 1039).

demurrer to plaintiffs' section 1983 claims without leave to amend. The demurrer to various other claims was sustained with leave to amend.

In August 2013, plaintiffs filed a fourth amended complaint, asserting various section 1983 claims against Kratzer for violation of the civil rights of Nancy, Elsie, and Jeffrey. They also asserted claims for intentional infliction of emotional distress, negligence, false imprisonment, chemical battery, and violation of the Elder Abuse and Dependent Adult Civil Protection Act (§ 15600 et seq.; EADACP Act). Kratzer and the City demurred to the fourth amended complaint. The trial court sustained the demurrer without leave to amend as to plaintiffs' claims for civil conspiracy, intentional infliction of emotional distress, false imprisonment, chemical battery, and violation of the EADACP Act.

In June 2014, Kratzer moved for summary judgment on the remaining section 1983 claims against her. Kratzer and the City also moved for summary judgment on plaintiffs' negligence claim. The trial court denied the motion. Kratzer and the City filed a petition for a writ of mandate with this court, seeking review of the trial court's order denying summary judgment. We stayed all proceedings in the trial court, and then issued an alternative writ of mandate, commanding the trial court to set aside its order. After further briefing, the trial court issued an amended order granting the motion for summary judgment on January 12, 2015. On January 26, 2015, the trial court entered judgment in favor of Kratzer and the City and against plaintiffs.

II. DISCUSSION

Plaintiffs argue the trial court erred in granting summary judgment on their section 1983 claims against Kratzer.[5] They also argue they should have been granted leave to amend their section 1983 claim against the City. We conclude Nancy's section 1983 claim against Kratzer fails because Kratzer had probable cause to detain her pursuant to Welfare and Institutions Code section 5150 and Kratzer is protected by

[5] Plaintiffs do not appear challenge the trial court's ruling on their negligence claim.

qualified immunity. Jeffrey's and Nancy's section 1983 claims against Kratzer are largely precluded by res judicata. To the extent these claims are not barred, they fail as plaintiffs have not raised a triable issue of fact. We also find granting leave to amend the section 1983 claims against the City would be futile.

A. *Summary Judgment Standard of Review*

We review the trial court's decision to grant Kratzer and the City's motion for summary judgment de novo. (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 163.) Summary judgment must be granted if all the papers and affidavits submitted, together with "all inferences reasonably deducible from the evidence" and uncontradicted by other inferences or evidence, show "there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) Where, as here, the defendant is the moving party, he or she may meet the burden of showing a cause of action has no merit by proving one or more elements of the cause of action cannot be established. (See *id.*, subd. (o).) Once the defendant has met that burden, the burden shifts to the plaintiff to show the existence of a triable issue of material fact as to that cause of action. (*Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 583.) We must consider all evidence in the light most favorable to the nonmoving party, which in this case are plaintiffs. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.)

B. *Nancy's Section 1983 Claim Against Kratzer*

Nancy's section 1983 claim is predicated on the allegation Kratzer violated her constitutional rights by initiating the Welfare and Institutions Code section 5150 hold without probable cause and by falsifying a police report. The trial court granted summary judgment on this claim, finding Kratzer had probable cause to initiate the section 5150 hold, plaintiffs' allegations that Kratzer falsified her police report were both conclusory and immaterial, and Kratzer was protected by qualified immunity. Nancy, through her guardian ad litem, now argues the trial court erred in finding there was probable cause. She further argues that, as a matter of law, she was not eligible for a hold under section 5150 because the statute does not apply to persons with developmental

disabilities. We find both arguments unavailing. We also agree with the trial court that Kratzer is entitled to qualified immunity as her actions did not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

1. *Probable Cause*

As an initial matter, we agree with the trial court the undisputed facts support a finding Kratzer had probable cause to detain Nancy pursuant to section 5150.

Under section 5150, a part of the Lanterman-Petris-Short Act (§ 5000 et seq.; LPS Act), a peace officer may take into custody any person who "as a result of mental health disorder, is a danger to others, or to himself or herself, or gravely disabled," and to place such a person in a county-designated facility for an initial 72-hour treatment and evaluation. (§ 5150, subd. (a).) The peace officer must have probable cause for the detention. (*Ibid.*) "To constitute probable cause to detain a person pursuant to section 5150, a state of facts must be known to the peace officer . . . that would lead a person of ordinary care and prudence to believe, or to entertain a strong suspicion, that the person detained is mentally disordered and is a danger to himself or herself or is gravely disabled. In justifying the particular intrusion, the officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant his or her belief or suspicion. [Citations.] Each case must be decided on the facts and circumstances presented to the officer at the time of the detention [citation], and the officer is justified in taking into account the past conduct, character, and reputation of the detainee." (*People v. Triplett* (1983) 144 Cal.App.3d 283, 287–288.)

In this case, the undisputed facts show Kratzer had probable cause to initiate the section 5150 hold. As Kratzer explained in her application for the hold, Nancy was autistic, suffered from grand mal seizures, had disappeared for 15 hours, and had a history of wandering from her parents. Based on her observations and investigation, Kratzer concluded a risk of harm existed during Nancy's disappearance, insofar as she was not competent to protect herself or avoid dangerous situations. None of these facts are disputed. Based on her contact with SARC and APS, Kratzer also had reason to

believe Nancy's parents had refused assistance from social services agencies, and Nancy had been hospitalized because Elsie had refused to comply with doctor's orders regarding Nancy's medications. APS also informed Kratzer that Nancy had previously been placed on a section 5150 hold after there had been reports of domestic violence at the Golins' residence. Further, Kratzer observed a large wound on Nancy's foot which appeared partially infected and scabbed over. These facts alone would lead a reasonable person to believe Nancy could not care for her own basic needs, and could not rely on her parents to assist her.

Further, Kratzer believed Nancy's parents were homeless and living in a van. While Nancy asserts Kratzer falsified evidence concerning her living situation, she does not appear to dispute the family's housing situation was unstable. Elsie stated she was living in an RV with Nancy, and Jeffrey admitted he was living in his workshop. Kratzer also noticed Elsie's RV or van smelled of body odor and urine, and there was a portable toilet with a bag of urine in Jeffrey's studio. In any event, even without these facts, there is more than ample evidence to support a finding Kratzer had probable cause. Nancy cannot manufacture a dispute of material fact by asserting some of the details about the family's housing situation were incorrectly stated in Kratzer's police report.

Nancy argues defendants did not meet their initial burden on summary judgment because they failed to submit a declaration from Kratzer. But no such declaration was necessary in light of the police reports and other documents created by Kratzer and submitted into evidence. These documents reflect Kratzer's thinking at the time she initiated the section 5150 hold.[6] Nancy complains the police report was not authenticated, as it was attached to a response to a request for production, which in turn was attached to an attorney declaration in support of the summary judgment motion. But Nancy waived this objection by failing to properly raise it below. (See Code of Civ.

[6] Nancy further argues Kratzer did not submit evidence of what she relied on when she acted because her police report was dated the day after she took Nancy into custody. The argument is unavailing. Police officers cannot reasonably be expected to draft their reports while simultaneously investigating cases.

Proc., § 437c, subd. (b)(5).) Plaintiffs' counsel made a litany of oral objections at the summary judgment hearing, but those objections were not specific. Counsel stated: "We object to the police report. It's not authenticated. There is no showing of personal firsthand knowledge. It is hearsay. What does it mean?" At no point during the hearing did counsel argue the report should be excluded because it was attached to a response to a request for production. These boilerplate objections do not meet the requirements of the California Rules of Court, which require parties to "State the grounds for each objection." (Cal. Rules of Court, rule 3.1354(b)(4).) In any event, even if the police report was inadmissible, summary judgment was still proper based on Kratzer's application for the section 5150 hold, to which plaintiffs did not object; plaintiffs' verified complaint, which sets forth much of the contents of Kratzer's police report; and plaintiffs' own separate statement, in which they set forth various undisputed facts concerning Kratzer's conduct and the contents of her report.

Nancy further argues she was not a danger to herself. The facts suggest otherwise. Nancy was severely autistic, and it is undisputed she was unable to care for herself. When Kratzer decided to initiate the hold, Nancy had just wandered away from home for 15 hours and returned unkempt and injured. Nancy now argues that, notwithstanding that she has the mental capacity of a five year old, "[t]he most that can be said about Kratzer's assertions is that Nancy Golin was vulnerable, not that she was dangerous." Yet Kratzer had reason to believe Nancy was more than vulnerable. In light of Nancy's history of wandering, Jeffrey and Elsie's reported conflicts with medical professionals and social service agencies, and other evidence suggesting Jeffrey and Elsie were unable to adequately care for Nancy, Kratzer had probable cause to believe Nancy posed a danger to herself while she remained in her parents' care.

2. *Qualified Immunity*

Nancy argues section 5150 applies only to mentally disordered individuals, and this class of persons does not include persons with developmental disabilities. Nancy also contends that since she has been diagnosed with autism, she is developmentally disabled, not mentally disordered. Thus, according to Nancy, Kratzer could not have had

probable cause to detain her under section 5150. To the extent Nancy is correct about section 5150, Kratzer cannot be held liable because she is entitled to qualified immunity.

As discussed, section 5150, which is part of the LPS Act, applies "When a person, as a result of a mental health disorder, is a danger to others, or to himself or herself, or gravely disabled." (§ 5150, subd. (a).) The trial court found the term "mental disorder" is not defined in the statute, but the term may be construed to include mental disorders, including autism, which are set forth in the Diagnostic and Statistical Manual of Mental Disorders (the DSM). Citing our Supreme Court's decision in *People v. Barrett* (2012) 54 Cal.4th 1081 (*Barrett*), the trial court also found there is case law indicating autism is a mental disorder. For these reasons, the court rejected plaintiffs' contention that no reasonable officer would believe autism is a mental disorder for the purposes of section 5150.

Nancy now argues the Legislature has long distinguished between persons with mental disorders and persons with developmental disabilities. Nancy asserts the purpose of the LPS Act is to end the inappropriate and involuntary " 'commitment of mentally disordered persons, developmentally disabled persons, and persons impaired by chronic alcoholism, and to eliminate legal disabilities.' "[7] According to Nancy, this language distinguishes between persons with three different, and mutually exclusive, types of mental conditions. Nancy further argues a related law, the Lanterman Developmental Disabilities Services Act (§ 4500 et seq.; LDDS Act), makes clear autism constitutes a developmental disability. She contends our Supreme Court's decision in *Barrett*, *supra*, 54 Cal.4th 1081, shows the courts have long distinguished between the "mentally retarded" and developmentally disabled on the one hand and the mentally disordered on the other. Finally, Nancy argues whether or not a condition is listed in the DSM should

[7] Nancy misquotes the statute. The actual language of the LPS Act states its purpose is to "end the inappropriate, indefinite, and involuntary commitment of persons with mental health disorders, developmental disabilities, and chronic alcoholism, and to eliminate legal disabilities." (§ 5001, subd. (a).)

not be dispositive, and a peace officer should not be required to look in the DSM before filling out a section 5150 application.[8]

On this last point we agree. A police officer should not be required to specifically diagnose a subject's mental condition prior to initiating a section 5150 hold. If this is the case, how can an officer reasonably be expected to determine whether a person has a "mental disorder" as opposed to a "developmental disability," especially since the Legislature has yet to clearly distinguish between the two or even define the former term? Nancy is essentially arguing Kratzer should have parsed the language of the LPS Act and LDDS Act, engaged in a sophisticated legal analysis of the statutes, and determined whether the type of autism exhibited by Nancy qualifies as a mental disorder or a developmental disability before initiating the section 5150 hold. However, "[w]e do not require police officers to act as legal experts to avoid violating the Constitution; substantive due process secures individuals from 'arbitrary' government action that rises to the level of 'egregious conduct,' not from reasonable, though possibly erroneous, legal interpretation." (*Brittain v. Hansen* (9th Cir. 2006) 451 F.3d 982, 996.) When, as here, an officer's conduct is reasonable, the officer is entitled to qualified immunity.

Qualified immunity shields government officials from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (*Harlow v. Fitzgerald* (1982) 457 U.S. 800, 818.) It is not enough for a plaintiff to assert a vague constitutional right. (*Bradley v. Medical Board* (1997) 56 Cal.App.4th 445, 456.) "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." (*Anderson v. Creighton* (1987) 483 U.S. 635, 640.) " '[I]t is not necessary that the alleged acts have been previously held unconstitutional, as long as

[8] Nancy also argues the purpose of section 5150 is to evaluate and treat a mental disorder, not to hold a person for placement in a residential facility. But they point to nothing in the record suggesting this was Kratzer's intent in initiating the hold. In her section 5150 application, Kratzer did recommend a "Public guardian referral should be made for conservatorship." But she did not state this was the reason for the hold.

the unlawfulness [of defendant's actions] was apparent in light of pre-existing law.' [Citation.] 'In other words, while there may be no published cases holding similar policies unconstitutional, this may be due more to the obviousness of the illegality than the novelty of the legal issue.' " (*San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose* (9th Cir. 2005) 402 F.3d 962, 977.)

Here, to the extent Nancy's interpretation of the statute is correct, it has not been clearly established. Nancy cannot point to a single case holding or suggesting section 5150 does not apply to persons with autism or other persons similarly situated to Nancy. While Nancy repeatedly cites to *Barrett, supra*, 54 Cal.4th 1081, that case was decided 11 years *after* Nancy's detention and thus has no bearing on whether the rights at issue were clearly established at the time. Further, *Barrett* was not about section 5150. The issue presented was whether the trial court was required to obtain Barrett's personal waiver of a jury trial on a section 6500 petition to commit her as a "mentally retarded person" who was a danger to herself or others. (*Barrett*, at pp. 1088–1089.) At one point, the court stated persons subject to the LPS Act might benefit from a jury trial advisement, whereas "in the case of persons alleged to be mentally retarded and dangerous under section 6500, the commitment process itself raises substantial doubts about their cognitive and intellectual functioning sufficient to limit the personal and procedural role they play." (*Barrett*, at p. 1109.) Nevertheless, the court did not have occasion to address whether the distinction between mentally disordered and "mentally retarded" persons mattered for the purposes of section 5150. Nor does the other authority cited by Nancy address this issue.[9]

For these reasons, Nancy's claims against Kratzer fail.

C. *Jeffrey and Elsie's Section 1983 Claim Against Kratzer*

The second cause of action in the fourth amended complaint was brought by Jeffrey and Elsie against various defendants, including Kratzer. It asserts Kratzer is

[9] (See *Heller v. Doe* (1993) 509 U.S. 312; *Kremens v. Bartley* (1977) 431 U.S. 119; *O'Connor v. Donaldson* (1975) 422 U.S. 563; *Cramer v. Gillermina R.* (1981) 125 Cal.App.3d 380; *In re Krall* (1984) 151 Cal.App.3d 792, 795.)

liable under section 1983 because she violated Jeffrey's and Elsie's constitutional rights under the First, Fourth, and Fourteenth Amendments. The claim is not the model of clarity, as it does not specifically discuss the factual basis for the claims against Kratzer, or most of the other defendants for that matter.[10] The trial court found the claim arose out of the police entry of Jeffrey and Elsie's living and working space, their arrests and prosecutions for dependent and adult abuse, and the alleged infringement of their constitutional rights to familial association based on the allegedly improper placement of Nancy on a section 5150 hold. In their briefing, they assert their section 1983 claim is also based on Kratzer's failure to follow the proper procedure in obtaining an emergency protective order against them.

As discussed above, the section 5150 claim fails because Kratzer had probable cause to detain Nancy. The malicious prosecution, false arrest, and unconstitutional search claims are barred by res judicata.[11] Jeffrey and Elsie brought practically identical section 1983 claims against Kratzer when they filed their federal action in 2003. Those claims were subsequently dismissed and final judgment was entered. They are now trying to get a second bite at the apple and relitigate their federal claims in another forum. This they cannot do. To the extent the emergency protective order claim is not barred by res judicata, it fails for a variety of other reasons.

1. *Res Judicata*

To the extent Jeffrey and Elsie's section 1983 claim is predicated on allegations of malicious prosecution, false arrest, and unlawful search and entry, the claim is barred by res judicata.[12]

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[10] The second cause of action cross-references over 100 paragraphs from other parts of the pleading, but this does little to clarify the basis for the claim.

[11] Kratzer argues Jeffrey and Elsie's section 1983 claims are also barred by the statute of limitations. We decline to address this issue as it was raised for the first time on appeal.

[12] Even if these claims were not barred by res judicata, summary judgment was still appropriate. The malicious prosecution claim fails for the reasons set forth by the

When, as here, a prior judgment was rendered by a federal court on the basis of federal question jurisdiction, the preclusive effect of the prior judgment is determined by federal law. (*Butcher v. Truck Ins. Exchange* (2000) 77 Cal.App.4th 1442, 1452.) Under federal law, "[r]es judicata, also known as claim preclusion, bars litigation in a subsequent action of any claims that were raised *or could have been raised* in the prior action. [Citations.] In order for res judicata to apply there must be: 1) an identity of claims, 2) a final judgment on the merits, and 3) identity or privity between parties." (*Western Radio Servs. Co. v. Glickman* (9th Cir. 1997) 123 F.3d 1189, 1192, italics added.) "The central criterion in determining whether there is an identity of claims between the first and second adjudications is 'whether the two suits arise out of the same transactional nucleus of facts.' " (*Frank v. United Airlines, Inc.* (9th Cir. 2000) 216 F.3d 845, 851.) "It is immaterial whether the claims asserted subsequent to the judgment were actually pursued in the action that led to the judgment; rather, the relevant inquiry is whether they could have been brought." (*U.S. ex rel. Barajas v. Northrop Corp.* (9th Cir. 1998) 147 F.3d 905, 909.)

In this case, all the elements of res judicata are satisfied. As an initial matter, there can be no dispute Jeffrey, Elsie, and Kratzer were all parties to the federal action. There is also an identity of claims, as the section 1983 claims asserted by Jeffrey and Elsie in the federal action are practically identical to the claims asserted in the fourth amended complaint in this action. More importantly for the purposes of our analysis, both sets of section 1983 claims arise from the same transactional nucleus of facts. In the federal action, as in the instant action, Jeffrey and Elise's claims were predicated on the search of their living and working space, and their arrest and subsequent prosecution.

Further, there was a final judgment on the merits in the federal action. The district court found it lacked jurisdiction to consider Jeffrey and Elsie's claims to the extent they represented a collateral attack on the conservatorship proceedings. To the extent their

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federal district court, Kratzer had probable cause to arrest Jeffrey and Elsie, and they cite no evidence showing the police search exceeded the scope of their consent.

claims were independent of the conservatorship proceedings, the district court exercised its jurisdiction and dismissed them. For example, the court specifically discussed Jeffrey and Elsie's malicious prosecution claim, finding they failed to show the prosecution lacked probable cause or the case was resolved on the merits in their favor. That the court did not specifically discuss the false arrest or search and entry claims is of no moment, as those theories were also clearly independent of the conservatorship proceedings. And the district court made it clear such claims "fail[ed]."

Jeffrey and Elsie argue the district court expressly declined jurisdiction to determine the claim of interference with familial relations. Specifically, the court stated in a footnote: "To the extent the parents seek federal relief under 42 U.S.C. 1985(3) on the ground that various defendants conspired to deprive them of the company and care of their daughter, this order finds the claim inextricably intertwined with the probate court's order thus barred by *Rooker-Feldman*.[13] Federal jurisdiction cannot rest on this claim." But the interference with familial relation claims asserted in the federal action were focused on the conservatorship proceedings. As the district court explained in its order, it abstained from exercising jurisdiction over certain claims because it was concerned "[t]he relief requested in this case would interfere substantially with the continuing jurisdiction of the probate court over Nancy's conservatorship." The claims at issue here, malicious prosecution, false arrest, and unlawful search and entry, do not arise out of and are unrelated to the conservatorship proceedings. Whether or not Kratzer had probable cause to arrest Jeffrey and Elsie and refer them for prosecution has nothing to do with whether a conservator should have been appointed for Nancy. Neither does the issue of whether Kratzer's search violated Jeffrey's and Elsie's Fourth Amendment rights.

Next, Jeffrey and Elsie contend the law of the case precludes us from finding their claims are barred by res judicata. Specifically, they point to the Sixth Appellate District's 2010 opinion in a prior appeal in this case, *Golin v. Allenby*, *supra*, 190 Cal.App.4th 616.

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[13] *Rooker v. Fidelity Trust Co.* (1923) 263 U.S. 413 and *D.C. Court of Appeals v. Feldman* (1983) 460 U.S. 462 (*Rooker-Feldman*).

The trial court ordered plaintiffs to post a bond on the grounds they were vexatious litigants and there was no reasonable probability they would prevail in the action. (*Id.* at pp. 632–633.) The Sixth District reversed, concluding the defendants failed to carry their burden of showing plaintiffs were not likely to prevail. The court observed the defendants "cite[d] no authority and offer[e]d no real analysis." (*Id.* at p. 641.) The court also found neither the district court's order nor the order in the conservatorship's proceedings "determined the merits of essential claims raised here by the Golins—their entitlement to damages arising from the alleged illegal search of their property and from their having allegedly been maliciously prosecuted in a criminal proceeding." (*Id.* at pp. 641–642.) In a footnote, the court stated: "Our decision should not be read to state that the moving parties could not [show there was no reasonable probability plaintiffs would prevail], just that they did not." (*Id.* at p. 642, fn. 32.)

The Sixth Appellate District's opinion does not preclude a finding of res judicata here. The court did not expressly rule on the merits of a res judicata defense. Its finding was limited to whether the defendants had satisfied their burden of showing there was no likelihood plaintiffs would prevail on their claim. (*Golin v. Allenby*, *supra*, 190 Cal.App.4th pp. 641–642.) Moreover, the court made clear its finding was based on the defendants' failure to adequately brief the issue. The court noted the defendants did not cite authority or analysis on the issue of preclusion, and "did not attempt to show preclusion under either [res judicata or collateral estoppel] by demonstrating that the respective elements of either applied." (*Id.* at p. 641 & fn. 31.) The court also expressly stated its decision should not be read to say the defendants could not meet their burden, just that they had yet to do so. (*Id.* at p. 642, fn. 32.) In contrast, the briefing before us now shows res judicata bars many of Jeffrey and Elsie's claims.

2. *The Emergency Protective Order Claim*

After initiating the section 5150 hold, Kratzer obtained emergency protective orders from a judge, restraining Jeffrey and Elsie from having contact with Nancy. Jeffrey and Elsie assert the protective orders unlawfully interfered with their right to

family association. They speculate the orders were fabricated and no judge ever approved them. To the extent the claim is not barred by res judicata, it is meritless.

As an initial matter, the theory that Kratzer fabricated the protective orders is not alleged in the complaint. Accordingly, plaintiffs cannot rely on the theory to defeat summary judgment. (See *Shugart v. Regents of University of California* (2011) 199 Cal.App.4th 499, 509 [defendant entitled to rely on the scope of plaintiffs' operative pleading in seeking a summary disposition of the action].)

Next, the claim is based entirely on speculation. Jeffrey and Elsie have presented no evidence whatsoever to support their claim Kratzer failed to obtain a judge's approval for the emergency protective orders. They assert they raised a triable issue of fact by showing there is no record of the orders ever having been filed with the court. This fact, however, is insufficient to raise an inference a judge did not approve the orders. Jeffrey and Elsie further argue we can infer the order is fabricated because it contains so many obvious legal errors that no judge would have issued it. We disagree. Even if the protective orders were rife with legal errors (they are not), this raises the inference the issuing court erred, not that the orders were fabricated.

To the extent Jeffrey and Elsie are arguing Kratzer lacked good cause to request the protective orders, their claim also fails. Pursuant to Family Code section 6250, a judicial officer may issue an ex parte emergency protective order where a law enforcement officer asserts reasonable grounds to believe a dependent adult is in "immediate and present danger of abuse . . . based on an allegation of a recent incident of abuse . . . by the person against whom the order is sought." (Fam. Code, § 6250, subd. (d).) The definition of abuse encompasses "neglect," "abandonment," "isolation," and "[t]he deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering." (Fam. Code, § 6250, subd. (d); Welf. & Inst. Code, § 15610.07, subd. (a)(1)–(2).)

Here, Kratzer had ample grounds to believe Nancy was in immediate danger of neglect based on recent incidents of abuse. Nancy is severely autistic and unable to care for herself. She had just wandered away from her home unsupervised, and she had a

history of doing so. It is undisputed Nancy was at risk of harm when she wandered away from home alone, as she was not competent to protect herself or avoid dangerous situations. Additionally, social services reports requested by Kratzer indicated Nancy had been repeatedly hospitalized in the last several months due to her parents' refusal to properly administer her medications.

D. *Section 1983 Claims Against the City*

The trial court sustained the City's demurrer to the section 1983 causes of action asserted in the third amended complaint without leave to amend. Plaintiffs contend the trial court erred in denying them an opportunity to further amend their section 1983 claims against the City. We disagree and find plaintiffs' proposed amendments would be futile.

In the third amended complaint, plaintiffs vaguely asserted the City had unconstitutional policies and practices which were the driving force behind the violation of their constitutional rights. However, plaintiffs did not allege what those policies were. Plaintiffs argue they could now amend the pleading to state the City had a policy of setting the incorrect expiration date for emergency protective orders, which resulted in a deprivation of plaintiffs' right to familial association.

An emergency protective order expires on the fifth court day following the day of its issuance or the seventh calendar day following the date of its issuance, whichever comes first. (Fam. Code, § 6256.) In this case, Kratzer obtained the protective orders on November 16, 2001. The order should have expired on November 23, the seventh calendar day after its issuance. But the expiration date was erroneously set for November 27, the fifth court day. Plaintiffs assert Kratzer's later testimony establishes the error was due to the City's protocol for computing expiration dates. According to plaintiffs, Kratzer testified the City policy was to always count five court days from the

protective order's issuance, regardless of whether that was longer than seven calendar days.[14]

We conclude the proposed amendment would be futile. First, the City's policy is irrelevant as it is ultimately the issuing court that is responsible for setting the order's expiration date. Accordingly, plaintiffs' claim fails for lack of causation. (See *Novick v. City of Los Angeles* (1983) 148 Cal.App.3d 325, 332 [filing of charges by prosecutor, being independently commenced, severed chain of causation between illegal search which gave rise to plaintiff's cause of action and damages for having to defend against criminal charges].) Moreover, " 'brief removals [of a child from a parent's home] generally do not rise to the level of a substantive due process violation, at least where [as here] the purpose of the removal is to keep the child safe during investigation and court confirmation of the basis for removal.' " (*Southerland v. City of New York* (2d Cir. 2011) 680 F.3d 127, 153.) We are also skeptical the City could be held liable under section 1983 for such a hyper-technical error.

III. DISPOSITION

The judgment is affirmed. Costs are awarded to Kratzer and the City.

_____
Margulies, Acting P.J.

We concur:

_____
Dondero, J.

_____
Banke, J.

[14] Plaintiffs request we take judicial notice of Kratzer's testimony. That request is denied, as we cannot take judicial notice of the truth of the matter asserted in the testimony. In any event, for the reasons set forth above, we would reject plaintiffs' arguments concerning leave to amend even if we were to consider Kratzer's testimony.